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Supreme Court, U.S.
FILED
MAR 14 1997
CLERK

No. 96-1277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

William Branch,

Petitioner,

v.

Ari Parnes and Leslie Susser, on behalf of themselves and all persons similarly situated, and

Tower Air, Inc., Stephen L. Gelband, Morris K. Nachtomi, Goldman Sachs & Co., Lehman Brothers, Inc. and Morgan Stanley & Co. Incorporated,

Respondents.

In re Tower Air, Inc. Securities Litigation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE TOWER AIR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated: March 13, 1997

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals' unanimous summary order affirming the District Court's approval of a class action settlement involving a settlement class violate the due process requirements of the Fifth Amendment to the United States Constitution or the adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure?

PARTIES TO THE PROCEEDING

Respondents Tower Air, Inc., Morris K. Nachtomi, Stephen L. Gelband (collectively, the "Tower Respondents" or the "Tower Defendants"), Goldman Sachs & Co., Lehman Brothers, Inc. and Morgan Stanley & Co. Incorporated (collectively, the "Underwriter Defendants") were defendants in the underlying litigation in the United States District Court for the Eastern District of New York and defendants-appellees before the United States Court of Appeals for the Second Circuit.

Respondents Ari Parnes and Leslie Susser ("Plaintiffs") were the named plaintiffs in the consolidated actions in the Eastern District of New York and plaintiffs-appellees in the Court of Appeals.

Petitioner William Branch ("Petitioner") was the sole objector to the settlement of the Eastern District Action and the objector-appellant before the Court of Appeals. He also was the plaintiff in a related, putative class action filed in the United States District Court for the Southern District of New York against the Tower Defendants, the Underwriter Defendants and others.

STATEMENT OF CORPORATE AFFILIATION PURSUANT TO SUPREME COURT RULE 29.6.

Pursuant to Supreme Court Rule 29.6, Respondent Tower Air, Inc. identifies the following parent companies and nonwholly owned subsidiaries:

None.

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SUMMARY OF ARGUMENT

Although the very first phrase of Petitioner's Question Presented trumpets that this is a "due process" case, those words are never again repeated in the thirty pages of rambling arguments which Petitioner advances. Apparently, Petitioner believes that the words "due process" are the secret passwords affording entry into this Court, without the need for any real and substantial issue. Petitioner simply fails to demonstrate why this Court should grant certiorari.

To the contrary, Petitioner seems to believe that he possesses a fundamental right to have this Court review anew the flood of factual minutiae which explicitly was rejected by the District Court in approving this class action settlement, and by the

Court of Appeals for the Second Circuit in affirming that decision. This simply is not an appropriate basis for certiorari.

Tellingly, Petitioner never points to any instance in which Circuit Judges Amalya L. Kearse, John M. Walker, Jr., and Dennis G. Jacobs should be deemed to have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." SUP. CT. R. 10(a). Nor could Petitioner claim such a departure. The Second Circuit painstakingly read and listened to these same arguments before dismissing them as meritless.[1] Petitioner also fails to point to a single instance in which the Second Circuit misread the record before it. Nor does Petitioner point to any instance in which the Second Circuit misread or misapplied the law upon which they relied in pronouncing its mandate.

Petitioner also fails to point to any instance in which the District Court failed to properly apply the factors relevant to the approval of a class action settlement. Indeed, such a contrived argument would be directly contrary to an express finding of the Second Circuit, which unanimously held that the District Court "*meticulously* considered the appropriate factors . . . ." (A2 (emphasis added)).

Instead, Petitioner attempts to conjure a conflict among the Circuits where none exists. The very Third Circuit authority upon which Petitioner relies for this supposed "split" explicitly follows the same Second Circuit authority which the District Court followed in approving this settlement and upon which the Second

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[1] For the convenience of the Court, Petitioner's citation conventions are adopted herein. Thus, references to the Appendix to the Petition shall be cited as "A__," while references to the Joint Appendix before the Second Circuit shall be cited as "J__."

Circuit relied in affirming that decision.[2] Thus, the Third Circuit opinion upon which Petitioner relies – far from disapproving of the procedures used below – explicitly embraced the procedures "meticulously" followed by the District Court in certifying the class and approving the settlement.

Indeed, Petitioner's gamesmanship in now trying to manufacture a conflict between the Second and Third Circuits is evident from his own words. In arguing to the Second Circuit, Petitioner claimed that these same Second and Third Circuit authorities were in "accord" on this very point.[3] Stated simply and

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[2] As to the appropriate level of scrutiny to be given pre-certification settlements, both the Second and Third Circuits follow the standard enunciated in *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1984). *Compare In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 795-96 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (citing *Weinberger*), *with* A2 (Second Circuit in this case citing *Weinberger*).

As to the factors appropriately considered in evaluating the fairness and adequacy of such a settlement, both the Second and Third Circuits follow the standard enunciated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* test was adopted explicitly by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), which in turn was cited and followed by the Third Circuit in *GMC Pick-Up*, 55 F.3d at 785. The *Grinnell* test was cited and followed by the Second Circuit in *County of Suffolk v. LILCO*, 907 F.2d 1295, 1323 (2d Cir. 1990), which in turn was cited and followed by the Second Circuit in this case to support its holding that "the [District C]ourt meticulously considered the appropriate factors" in approving the settlement (A2). *See also* A27-33 (District Court applying the nine-factor test contained in all of *Grinnell*, *LILCO*, *Girsh* and *GMC Pick-Up*).

[3] *Infra* at 19-20 & n.10.

stripped of Petitioner's sharp practices, the Petition presents no conflict of authority among the Circuits on any important federal matter warranting certiorari.

It is important to note here that a case concerning class action settlements in which this Court recently heard oral argument, *Amchem Products, Inc. v. Windsor*, No. 96-270, 1997 WL 83675 (Feb. 18, 1997), is wholly inapposite. In *Amchem*, this Court granted certiorari to consider the propriety of a Third Circuit decision revoking class certification. The specific issue presented for review was whether a district court could certify a class for settlement purposes which it could not have certified for litigation purposes. No such issue is presented here. Indeed, Petitioner does not, and cannot, object to the certification of the class here. It is undisputed that the class certified here in the settlement context – purchasers of Tower Air common stock from and after November 15, 1994 through October 31, 1995 – consists of persons and entities Petitioner himself sought to have certified as a class and represent for all purposes in the action he commenced in the Southern District of new York. (J23-24).

Next, to the extent Petitioner might be deemed to be making an oblique argument that he was denied due process, Petitioner overlooks that he was granted more "process" than any other member of the Class. It remains undisputed below that Petitioner was given an advance draft of the class notice, and his comments to that draft were incorporated into the final class notice which was presented to, and approved by, the District Court. (A19, A28). Indeed, nowhere in his Petition does Petitioner argue that the class notice was flawed in any respect, including those portions which described specifically the impact of the proposed settlement, if approved, on Petitioner's related action in the Southern District. (Eastern District Action Docket Entry 34). Also, Petitioner reviewed all of the discovery taken in the Eastern District Action (Petition at 18; J459), which included thousands of pages of documents and transcripts of every deposition conducted (J757-61). Petitioner had, and availed himself of, the opportunity to submit extensive written objections to the terms of the settlement

and to appear and argue through two separate counsel before the District Court. (A3-21; A24-26). Finally, Petitioner alone was afforded an additional opportunity to opt-out of the Class, and therefore the Settlement, weeks *after* opt-outs were required from all other members of the Class and *after* the District Court had found that the settlement should be approved. (A33, A35-36).

In the final analysis, we respectfully submit that there is only one question posed by the Petition before this Court:

> May a minority shareholder, together with his litigious counsel who has been sanctioned for the prosecution of frivolous securities law claims and failing to comply with judicial directives,[4] be permitted to derail a class action settlement and further delay (now over one year since its approval by the District Court) distribution of the multi-million dollar settlement fund to the class which overwhelmingly approved it, in order to maintain their own after-filed and duplicative class action, and to attempt to exploit the *in terrorem* value such an action creates?

The Tower Respondents respectfully submit that the answer to this question is a resounding "no," and that this question certainly does not warrant review by this Court.

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[4] *Infra* at 13 & nn. 6 & 7.

COUNTER-STATEMENT OF THE CASE

In November 1993, 3.75 million shares (about 24.2%) of the outstanding common stock of Tower Air, Inc. ("Tower") were sold to the public in an initial public offering (the "IPO"). (J823). In connection with that IPO, Tower and certain of its stockholders, including respondent Morris K. Nachtomi, Tower's Chief Executive Officer and Chairman of its Board of Directors, and Stephen L. Gelband, Tower's Secretary and a director, sold such shares to a syndicate of underwriters led by Goldman Sachs & Co., Lehman Brothers, Inc. and Morgan Stanley & Co. Incorporated. (J823). To effect this IPO, Tower filed with the Securities and Exchange Commission a registration statement on Form S-1 (the "Registration Statement"), including a prospectus, declared effective on and dated November 15, 1993 (the "Prospectus"). (J824-904). Several months later, in connection with its annual stockholders meeting on June 21, 1994, Tower disseminated to its stockholders a proxy statement (the "Proxy Statement") accompanied by an Annual Report on Form 10-K. (J931-967).

A. The Eastern District Action

Plaintiffs Ari Parnes and Leslie Susser filed complaints in March and June 1994 in the Eastern District of New York asserting various claims under the Securities Act of 1933, 15 U.S.C. § 77a, against Tower and Messrs. Nachtomi and Gelband. These actions later were consolidated and, in August 1994, an Amended and Consolidated Complaint (the "Class Complaint") was filed adding the Underwriter Defendants (the "Eastern District Action"). (J17-37).

The gravamen of the Class Complaint was that the Prospectus allegedly failed to disclose that a single customer accounted for over 8% of Tower's gross revenues in 1993, *i.e.*, that over 8% of its 1993 revenues resulted from one-year charter contracts with P.T. Garuda, an Indonesian airline, pursuant to which Tower aircraft were used to transport Muslim pilgrims to

Saudi Arabia during the "Hadj" period (the "Hadj Claim"). (J13). After Tower disclosed publicly in March 1994 that it had been told by Garuda that it would not receive contracts from Garuda for the 1994 Hadj, its stock price declined by 23% in two days and the first of the two Eastern District Actions was commenced shortly thereafter. (J14).

B. The Branch Action

In September 1994, after public disclosure of the Eastern District Action in a Tower Form 10-Q, Petitioner Branch, a purported purchaser of 100 shares of Tower Air stock for a total cost of $1,616.75, filed his own putative class action in the Southern District of New York (the "Branch Action"), alleging various claims under Sections 5 and 11 of the Securities Act of 1933, 15 U.S.C. §§ 77e and 77k, and Sections 10(b), 14(a) and 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, 78n and 78t. Branch's complaint alleged claims against the Tower Defendants, the Underwriter Defendants, Tower's public accounting firm (Ernst & Young) and various other persons and entities that sold stock in connection with the IPO (the "Branch Complaint"). (J913-14).

The Branch Complaint alleged that the IPO was accomplished by means of a materially false and misleading Registration Statement and Prospectus and that the Tower 1994 Proxy Statement was materially misleading. In addition to claims in respect of the Hadj, Branch alleged that these documents inadequately disclosed:

- the difference between book and fair market value of Tower's flight equipment (although GAAP requires recording assets at book value) (J912);

- the estimated cost of aircraft maintenance and overhaul and the cost of complying with certain Aging Aircraft Airworthiness Directives ("ADs") promulgated by the Federal Aviation Administration (the "FAA") (although this cost figure was quantitatively insignificant) (J912);

- Tower's ability to fly non-stop from New York to Tel Aviv, and to thereby compete with El Al on this route (J912-13);

- Tower's purported lack of "quality" services (J913);

- Tower's policy of minimizing fixed costs (J913);

- revenues, by failing to reflect certain consumer "discounts" (J913); and

- the alleged use by Mr. Nachtomi, as his personal residence, of a Trump Tower apartment owned by Tower (J913).[5]

The Branch Complaint sought to define an open-ended class, *i.e.*, all purchasers of Tower shares commencing on November 16, 1993 but with no "close" date. (J403-04). Petitioner sought to represent such class, and alleged therein that the class action device was maintainable–indeed, "superior"–for the prosecution of the claims asserted in the Branch Complaint. (J405). Because the Branch Action never progressed beyond the pleading stage, no motions to certify the class were interposed.

On November 3, 1995, Judge Keenan of the Southern District granted a motion to dismiss the Branch Complaint with leave to replead certain federal securities claims. (J929). Other claims therein were dismissed with prejudice for failure to state a

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[5] Months before the filing of the Branch Action, Plaintiff's counsel in the Eastern District Action had learned of the substance of these claims through correspondence between Tower's counsel and Branch's counsel produced by Tower in discovery in the Eastern District Action. (J758). At that stage, Plaintiff's counsel investigated the Branch claims with the aid of retained experts, and "found virtually all of them to be, at best, largely immaterial and, at worst, bordering on the frivolous (and even 'south of the border')." (J758).

claim. (J929). On January 26, 1996, Branch filed an amended complaint restating certain of his previously dismissed securities claims and adding others (the "Amended Branch Complaint"). (J381-456). The Amended Branch Complaint subsequently was dismissed with prejudice.[6]

C. The Settlement

During the first 1½ years of the Eastern District Action, substantial document discovery was conducted by plaintiffs, including the review of thousands of pages of documents produced by the Tower and Underwriter Defendants and by non-party AGOS U.S.A., Tower's agent with respect to its Hadj contracts with Garuda. (J759-60). During the same period, depositions of the putative class representatives were conducted. (J760-61).

Settlement negotiations began in mid-1995. The Tower defendants made it clear – to plaintiffs and to Magistrate Judge Mann – throughout the negotiations that they would not settle unless they received a release of all claims arising from the IPO and Proxy Solicitation, including the "non-Hadj" claims. (J768-73). Only thereafter – and with the active assistance of Magistrate

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[6] On May 7, 1996, in a ruling from the Bench which was not memorialized in a written Order, Judge Keenan dismissed the Amended Branch Complaint without prejudice (in light of the approval of the class settlement in the Eastern District, from which Branch failed to opt-out). (Judge Keenan also sanctioned Avrom S. Fischer, Branch's attorney, over $1,000.00 for failing to appear at a long-scheduled conference to "show cause" why the Amended Branch Complaint should not be dismissed. (Branch Action Docket Entry 43)).

Following the Second Circuit's affirmance of the District Court in the Eastern District Action, the Amended Branch Complaint was dismissed with prejudice by Order dated December 10, 1996. (Branch Action Docket Entry 44).

Judge Mann – did the parties reach in August 1995 an agreement in principle to settle globally for $2.5 million all claims relating to the Tower IPO and Proxy Solicitation, subject to further discovery to confirm the settlement's fairness and adequacy. (J772).

This additional discovery was conducted in August, September and October 1995. In addition to further document productions during this discovery phase, Plaintiff's counsel deposed three high ranking Tower officials: Morris Nachtomi (CEO), Josephina Essex (CFO) and William Cain (VP for Maintenance). (J770, J38-291). Plaintiff's counsel also consulted with stock market expert John Hammersbough and C.P.A. Sam Shuster to assist in evaluating liability and damages issues before counsel began negotiating the final terms of the settlement. (J762-63). In addition, Plaintiff's counsel retained Professor Gregg A. Jarrell, former Chief Economist for the Securities and Exchange Commission, to review the materiality of the Hadj and non-Hadj claims, to perform a damages analysis and to opine on the adequacy of the settlement. Professor Jarrell concluded that: (i) only the Hadj claims had a material impact on Tower's stock price; (ii) the non-Hadj claims would not be material to a reasonable investor; and (iii) the non-Hadj claims never impacted Tower's stock price. He concluded that the proposed settlement was fair, reasonable and adequate. (J528). Also in October 1995, to avoid any later disputes over the scope of the proposed settlement (including disputes with Petitioner) and to provide the clearest possible notice to all class members of the released claims, plaintiffs filed a Second Amended and Consolidated Complaint (the "Amended Class Complaint") incorporating the allegations of both the Eastern District Action and the so-called core (or "non-Hadj") allegations of the Branch Action. (J338-68, J769-70).

The parties to the Eastern District Action signed a formal Stipulation of Settlement on October 31, 1995. (J310-37, J770). The very next day, November 1, 1995, Petitioner Branch's counsel was given copies of all of the settlement papers, including the Stipulation of Settlement and proposed form of notice to the class. His counsel subsequently commented on the form and content of

such notice and his comments actually were incorporated into the class notice subsequently provided to, and approved by, the District Court. (J1050). The notice authorized by the District Court to be sent to the class described the allegations in the Amended Class Complaint, the Branch Complaint, and the impact on the Branch Action of approval of the settlement, and provided instructions on how to serve and file objections, request exclusion from the class, and submit a proof of claim. (J772-73).

As part of the settlement, by order dated November 1, 1995, the District Court provisionally-certified a class (the "Class") comprised of:

> all persons and entities who purchased Tower Shares, between November 15, 1993 and October 31, 1995 (the "Class Period"), but excluding each of the defendants, any affiliate, subsidiary, or entity controlled by the defendants, any immediate family member of any individual defendant or any legal representative, heir, successor or assign (acting as such) of any excluded person. (J316).

The Class overwhelmingly supported the settlement. Only three shareholders–representing less than 0.293% of Tower's publicly-owned shares–requested exclusion, despite the fact that notice had been mailed to over 5,000 persons. (A3). Indeed, although the deadline for claims was still months away, by the time of the fairness hearing in February 1996 over 175 claims had been submitted, representing more than a quarter of a million Tower shares. (A3). Petitioner Branch, the holder of only 100 shares of Tower stock, was the *sole* objector to appear at the fairness hearing or file papers opposing the settlement. (A4).

D. Petitioner Was Given Full Access to All Discovery Materials and Enjoyed a Full and Fair Opportunity to Be Heard.

Even Petitioner Branch admits that he was given complete access to all discovery materials obtained by Class counsel, including thousands of pages of documents and full transcripts of all depositions conducted throughout the litigation. (Petition at 18). Significantly, Branch never sought to conduct any discovery of his own, including leave to depose any party or counsel to the Eastern District Action concerning the settlement.

Prior to the February 9, 1996 fairness hearing before the District Court, Petitioner served voluminous and detailed written objections to the proposed settlement, including:

- a 52 page affidavit of Avrom S. Fischer, Petitioner's lead counsel (J457-509);
- an 11 page further exposition of Petitioner's "Objections" (J369-79);
- a memorandum of law (Eastern District Action Docket Entry 47); and
- a report of R. Alan Miller, Petitioner's purported securities damages expert (J510-23).

At the fairness hearing, the District Court afforded Branch an additional, extended period to be heard orally through two separate counsel, Mr. Fischer and Mr. Angstreich. (A3, A5-18). Although Branch's counsel made detailed and lengthy arguments, they did not attempt to present any factual evidence nor offer any witnesses (fact or expert) to the District Court. (A3-37).

E. The Settlement Was Approved Over Petitioner's Objections

After careful consideration of all of Petitioner's objections (A5) and application of the well-established factors pertinent to the question of whether a proposed settlement of a class action should be approved (A27-33), the District Court determined that the proposed settlement was fair and adequate (A27-33). Additionally, the District Court determined that the Class had been adequately represented throughout the litigation by Class counsel and should be certified for all purposes. (A30).

The District Court also found that some of Branch's arguments were interposed in an attempt "simply to delay" the approval of the settlement and were contrary to the true facts then known to the Court:

> I do recognize that, and I have to take some care in this case that the approach that Branch has taken in this Court has been to try to promote delay. I mean, even the argument made to me about the adequacy of the notice, I didn't interrupt at the time, but I knew that Branch had seen the notice before it had gone out. This was not a case in which, you know, he too was surprised by the notice when he got it, or that he only realized this week that something was not disclosed. I mean, I'm very troubled by an attempt simply to delay.

(A25). This last finding should come as no surprise to anyone familiar with this litigation or with Branch's lead counsel, who has in the past been sanctioned for prosecuting frivolous securities law claims[7] and for failing to comply with judicial directives.[8]

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[7] After dismissing an amended class action complaint alleging violations of Section 11(a) of the Securities Act of 1933 and Section

(continued...)

A final order and judgment was entered by the District Court, dismissing with prejudice and releasing the claims of Class members, including Branch, who had declined to opt-out of the Class. It is from this final order and judgment that Branch appealed to the Second Circuit. (J1056).

F. Petitioner Was Afforded Yet Another Opportunity to Opt-Out of the Class

At the conclusion of the fairness hearing and *after* the District Court had determined that the settlement should be approved, the District Court afforded Branch yet another opportunity to opt-out of the Class. (A33). Although the time period for opting out stated in the Class notice had passed weeks prior

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[7](...continued)
10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, Judge Bartels of the Eastern District found:

> plaintiff's claims in the complaint and amended complaint are frivolous . . . .
>
> Accordingly, the court grants . . . defendants' motion for reasonable attorneys' fees . . . . Liability for the fee award shall be imposed jointly and severally upon plaintiff and her attorney [Avrom S. Fischer] . . . .
>
> . . . .
>
> That this suit was brought as a class action is indicative of counsel's role in instituting this suit. Consequently, we believe that he should share the responsibility for moderate attorneys' fees incurred in defending this suit which never should have been brought.

Rubin v. LILCO, 576 F. Supp. 608, 616 & n.12 (E.D.N.Y. 1984).

[8] *Supra* n.6.

thereto, the District Court extended this opportunity to Petitioner and Petitioner alone. Through his counsel, Petitioner immediately declined this additional opportunity to opt-out. (A35-36).

G. The Second Circuit's Ruling

Circuit Judges Amalya L. Kearse, John M. Walker, Jr., and Dennis G. Jacobs entertained extensive oral argument at which Branch appeared and was heard through his lead counsel. Thereafter, on November 13, 1996, the Second Circuit affirmed the decision of the District Court certifying the Class, approving the settlement as fair and adequate, and finding the representation of the Class to be adequate:

> it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated by Judge Raggi on the record on February 9, 1996. The district court is required to determine whether a class action settlement is fair, adequate, and reasonable, and not a product of collusion. Since the district judge "is in the best position to evaluate whether the settlement constitutes a reasonable compromise," her evaluation is to be accorded considerable deference and is reviewed only for abuse of discretion. Here, the court meticulously considered the appropriate factors, and we see no abuse of discretion in its approval of the settlement.
>
> We have considered all of appellant's contentions on this appeal and have found them to be without merit.

(A2 (citations omitted)). Significant to the Second Circuit's express finding that "all of [Petitioner Branch's] contentions [are] without merit" is the fact that *all* of the arguments Petitioner Branch advances in his Petition to this Court were fully briefed and

orally argued before the District Court and before the Second Circuit.

REASONS FOR DENYING THE WRIT

Petitioner has presented no justification for granting a writ of certiorari: there is no split of authority among the circuit courts on matters presented here, and the Second Circuit did not depart from the "accepted and usual course of judicial proceedings." SUP. CT. R. 10(a).

I. USE OF A SETTLEMENT CLASS DOES NOT VIOLATE DUE PROCESS OR RULE 23.

Petitioner is wrong to the extent he is contending that the settlement class device, in and of itself, presents an issue warranting review by this Court. The use of a settlement class (*i.e.*, a class certified for settlement purposes after a settlement agreement has been reached) is a well-established procedure that provides a useful and necessary adjunct to the powers of the federal district courts to supervise the settlement of class actions. As the Third Circuit has stated – in the primary judicial opinion upon which Petitioner relies – the use of a settlement class "represent[s] a practical construction of the class action rule . . . [that] affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

Indeed, circuit courts that have considered the issue uniformly have upheld the use of settlement classes. *See Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Girsh v. Jepson*, 521 F.2d 153, 155 & n.3 (3d Cir. 1975); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Mars*

Steel Corp. v. Continental Ill, Nat'l Bank & Trust Co., 834 F.2d 677 (7th Cir. 1987); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987).[9]

The MANUAL FOR COMPLEX LITIGATION also expressly recognizes the use of settlement classes, citing such benefits as early settlement, reduced attorney fees, reduced costs which might have been spent in contesting Rule 23 certification, and the concomitant increase in settlement funds. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 30.45 (2d ed. West 1985). *See also Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 546 (D. Colo. 1989) (discussing § 30.45 in approving certification of a settlement class).

To be sure, some courts have noted that settlement classes pose certain risks. Thus, as the Third Circuit stated in *GMC Pick-Up*:

> settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action.

55 F.3d at 788. Accordingly, before certifying a settlement class, there is an acknowledged "need to assure an absence of collusion and an alignment of interests . . ." *GMC Pick-Up*, 55 F.3d at 799 & n.21. However, in *GMC Pick-Up* the Third Circuit concluded that these risks were outweighed by the benefits associated with the use of settlement classes, *i.e.*, the promotion of settlements by:

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[9] *See also Brucker v. Thyssen-Bornemisza Europe, N.V.*, 424 F. Supp. 679, 688 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1202 (2d Cir. 1977); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 277 (N.D. Cal. 1976); *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834-836 (E.D. Pa. 1971).

(i) avoiding costly certification battles; (ii) increasing defendant's incentive to settle; (iii) allowing stipulations to class certification; (iv) reducing litigation costs, thereby providing greater settlement funds; and (v) reducing subsequent challenges to the settlement. *Id.* at 790-91.

The Third Circuit in *GMC Pick-Up* also endorsed the use of settlement classes because certain procedural "safeguards" reduced to a minimum whatever risks they posed. In particular, the court noted the protections afforded by the notice requirement, Rule 23 certification procedures, and judicial fairness and adequacy review. *Id.* at 791. Moreover, as the Third Circuit observed, "the court can still monitor the negotiation process itself to assure that both counsel and the settlement adequately vindicate the absentees' interests." *Id.* Finally, due process protection is guaranteed by the right to opt out of the class and thus the settlement. Indeed, the use of a settlement class actually enhances the opt out right. As the Third Circuit recognized:

> the use of the settlement class in some sense enhances the plaintiff's right to opt out. Since the plaintiff is offered the opportunity to opt out of the class simultaneously with the opportunity to accept or reject the settlement offer, which is supposed to be accompanied by all information on settlement, the plaintiff knows exactly what result he or she sacrifices when opting out.

Id. at 792.

Other courts of appeals that have considered the risks posed by settlement classes – including the Seventh Circuit in *Mars Steel*, the only other opinion cited by Petitioner in this respect – have reached the same conclusion for substantially similar reasons. *See Weinberger*, 698 F.2d at 73 (2d Cir.) ("district judges who decide to employ [the settlement class] procedure are bound to scrutinize the fairness of the settlement agreement with even more than the

usual care"); *Dennis Greenman*, 829 F.2d at 1543 (11th Cir.) ("Such review gives eye to protecting the plaintiffs' interests and preventing collusion between defendants and plaintiffs purportedly representing the class during negotiations. Particularly, in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself."); *Mars Steel*, 834 F.2d at 681 (7th Cir.).

Having failed to unearth a single decision disapproving use of a settlement class, Petitioner attempts to conjure a conflict between the Second and Third Circuits over the proper legal standard to be used in assessing the adequacy of representation in the settlement class context. As best as we can determine from the Petition, Petitioner claims that the Third Circuit, in light of *GMC Pick-Up*, would not have approved settlement here because the Class was not adequately represented given the lack of "adversarial" negotiation or discovery in respect of the so-called non-Hadj claims. (Petition at 30).

In reality, however, no such conflict exists. The discussion in the Third Circuit's decision in *GMC Pick-Up* upon which Petitioner relies is entirely consistent with Second Circuit case law on this very point. *Compare GMC Pick-Up*, 55 F.3d at 795 ("the need for the adequacy of representation finding is particularly acute in settlement class situations, given the inquiry's purpose of detecting cases where there is a 'likelihood that the litigants are involved in a collusive suit'") (citations omitted), *with Weinberger*, 698 F.2d at 72 ("we will demand a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an earlier date").

Indeed, Petitioner's gamesmanship in now trying to manufacture a conflict between the Second and Third Circuits is evident from his own words. In arguing to the Second Circuit,

Petitioner claimed that these same Second and Third Circuit authorities were in "accord" on this very point.[10]

Moreover, it does not follow, either as a matter of logic or law, that a lack of "adversarial" discovery precludes certification and settlement approval as a matter of due process or under Rule 23. Neither the text of Rule 23 nor any case law of which we are aware contains any such prohibition. In fact, it is well-established that certification and settlement can occur even without *any* discovery at all. *See In re Baldwin-Ltd. Corp.*, 105 F.R.D. 479, 483 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 328 (2d Cir. 1985) (lack of discovery "not always a bar to class certification or even to approving the settlement") (*citing Jones v. Amalgamated Warbasse House, Inc.*, 97 F.R.D. 355, 360 (S.D.N.Y.), *aff'd*, 721 F.2d 881 (2d Cir. 1983), *cert. denied*, 466 U.S. 944 (1984); *Plummer v. Chemical Bank*, 688 F.2d 654, 658 (2d Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 2283 (1982)); *see also Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992) ("The absence of formal discovery has not always prevented consideration of settlement.") (*quoting Schwartz v. Novo Industri A/S*, 119 F.R.D. 359, 362 (S.D.N.Y. 1988)). To require "adversarial" discovery into every conceivable claim covered by a proposed class action settlement (no matter how facially weak) also would undermine at least one fundamental purpose of settlements: the avoidance of unnecessarily-protracted litigation and its concomitant burden on the courts and expense to the parties, which ultimately consumes funds which otherwise might go to absent members of the plaintiff class.

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[10] In his opening brief to the Second Circuit, Petitioner quoted from *GMC Pick-up*, then added: "when the settlement class device is used, an even higher level of judicial scrutiny is required. Accord, *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983)." (Petitioner's Opening Brief to the Second Circuit at 16).

Insofar as this particular case is concerned, there is no evidence in the record of any collusion or other impropriety in connection with the settlement or the circumstances under which it was reached. As noted above, the so-called non-Hadj claims were known to the Eastern District plaintiffs and their counsel before any settlement discussions began and even before Petitioner filed his competing action in the Southern District of New York. (J758). Even though the Eastern District plaintiffs and their counsel had every incentive at that time to assert the non-Hadj claims in the context of the Eastern District Action, they properly recognized that those claims were inherently weak, if not outright frivolous. (J758).

In addition, after settlement negotiations began in 1995 – and thereafter were pursued under the auspices of the Magistrate Judge in the Eastern District – defendants understandably insisted upon a release of all claims arising out of the Tower Air IPO and Proxy Solicitation as a condition to their agreement to pay the settlement amount of $2.5 million. (A10). This obviously was done in order to avoid piecemeal litigation. Contrary to the Petitioner's innuendo, and as the District Court was told, the complaint in the Eastern District Action subsequently was amended to add the non-Hadj claims in order to ensure that there would be no subsequent disputes with this Petitioner (and his litigious attorney) over the scope of the release and judgment (or over the District Court's power to enter such a judgment) if the settlement ultimately were approved. Moreover, an ample factual record was presented to the District Court demonstrating the adequacy of the Class's representation here, and Class members were afforded all of the protections and safeguards referred to above, including notice of the terms of the settlement, a description of the impact of the settlement on the Branch Action (if approved), and the right to opt-out of the Class and thus the settlement. Under these circumstances, neither due process nor Rule 23 require, as a condition to approving a settlement, "adversarial" discovery into insubstantial (if not completely irrelevant) matters such as the impact on Tower Air's flight patterns of hostilities in the former Yugoslavia and the stage of construction of runways at Ben Gurion Airport in Israel,

matters upon which this Petitioner extensively relies in his Petition to this Court. (Petition at 24-25).

In sum, the Second Circuit properly concluded that the District Court, in approving the settlement, "meticulously considered the appropriate factors" (A2), over which there is no disagreement among any of the circuit courts of appeal. As a result, we respectfully submit there is no basis here for issuance of a writ of certiorari on the theory that the Second and Third Circuits would have viewed the settlement of this class action differently due to a supposed lack of adversarial discovery.

II. NEITHER PETITIONER NOR THE CLASS WAS DENIED DUE PROCESS BY THE RELEASE OF THE CLAIMS ORIGINALLY INTERPOSED IN THE BRANCH ACTION.

Although masked by his lengthy exposition of factual minutiae, Petitioner also may be contending that Supreme Court review is warranted because he, or the Class as a whole, was denied due process. (Petition at i). Such an argument would be specious.

A. The District Court Afforded Petitioner and the Class Due Process, Including a Specific Finding as to the Quality of Class Representation.

The record is clear that the District Court afforded Petitioner and every other member of the Class due process, including the District Court's evaluation of: (1) the notice afforded Class members; (2) the experience of Class counsel and the quality of their legal work, as well as (3) the availability to Class members of the right to opt-out of the proposed settlement. (A19, A2-33). In fact, the record indicates the district judge specifically noted at several points in the proceeding the quality of the Class's legal representation:

> I am satisfied that adequate inquiry has been made by plaintiff's counsel before me to allow the case to be settled. (A31).
>
> * * *
>
> I weigh in this decision the fact that I have experienced plaintiff's counsel before me. It is not my task simply to blindly accept the recommendation, even of experienced plaintiff's counsel, and so I want to emphasize that I have not done that. (A33).
>
> * * *
>
> I'm satisfied that the quality of the legal work throughout has been high and conscientious . . . . (A34).

Indeed, the record shatters any possible contention that the Class was denied due process:

- Settlement negotiations were actively supervised by Magistrate Judge Mann, who ultimately suggested the settlement amount (J757, J768-69);

- Adequate notice was provided to the entire Class, describing the nature of the claims to be settled and providing detailed instructions on how to file objections, submit a proof of claim. or exercise the right to opt-out of the Class and thus the settlement (Eastern District Action Docket Entry 34; *see also* A28-29; J772-73). More specifically, the notice described the allegations in the Amended Class Complaint, the Branch Complaint, and the impact on the Branch Action of approval of the settlement. (A27-29; J772-73);

- The complaint in the Eastern District Action was amended to include the non-Hadj claims originally prosecuted in the Branch Action, to make absolutely clear – in the public record – the nature of the claims sought to be released by the settlement. (A19-20);

- The Class was represented at all times by experienced and competent counsel specializing in securities class actions (A30-31, A34-35);

- Pre-settlement discovery was conducted by Class counsel and supervised by Magistrate Judge Mann. Discovery included the review of thousands of pages of documents produced by the Tower and Underwriter Defendants and non-party AGOS U.S.A., Tower's agent with respect to the Hadj contracts with Garuda, depositions of high ranking Tower officers: Morris Nachtomi (CEO), Josephina Essex (CFO), and William Cain (VP for Maintenance); and consultation with stock market economists and accountants (A30-31; J38-291, J758-63, J769-70);

- The district judge conducted a fairness hearing in which she evaluated the adequacy of counsel, the sufficiency of the notice, as well as the substance of all claims, defenses, and objections (A3-37); and

- The district judge "meticulously" (A2) applied the legally relevant factors in finding the proposed settlement fair and adequate (A27-33). *See also supra* n.2.

The extremely positive reaction of the Class to the proposed settlement (A3-4, A28-30) buttresses the district judge's findings that the settlement was fair and adequate and that Class counsel adequately represented the interests of the Class. In light of this clear record, Petitioner simply has not offered–and can not offer–any evidence that the Class was denied due process.

B. Petitioner Was Afforded More Process Than Any Other Member of the Class.

To the extent that Petitioner may be arguing that he personally was denied due process, the record leads to the ineluctable conclusion that – far from any denial of due process – Petitioner was afforded more process than any other member of the Class:

- Petitioner obtained the entire discovery record, consisting of thousands of pages of documents and deposition transcripts (Petition at 18; A25; J757-61);

- Petitioner was afforded an advance draft of the proposed notice to the Class, and his comments thereto were incorporated into the final notice approved by the District Court (A19-20, A28-29);

- Petitioner was given copies of all of the settlement papers on November 1, 1995, several weeks before other members of the Class received notice of the settlement by mail. Petitioner thus knew all details of the settlement weeks earlier the others in the Class and thereby was afforded a greater opportunity to muster his objections;

- Petitioner filed voluminous objections to the settlement, including: a 52 page affidavit by his counsel; an 11 page exposition of "Objections"; a memorandum of law; and a report from his purported securities damages expert (J380-523);

- Petitioner was represented at the fairness hearing by two attorneys, Mr. Fischer and Mr. Angstreich, who were afforded substantial opportunity to present in detail Petitioner's objections (A4-19, A25-27); and

- The district judge repeatedly offered Petitioner the opportunity to opt out of the Class and thus the settlement – an

offer Petitioner continually declined. Indeed, Petitioner alone was afforded the right to opt-out *after* the settlement was approved, at the conclusion of the fairness hearing (A33, A35-36).

Petitioner also simply abandoned several rights he possessed. Although Petitioner alludes to possible collusion in the settlement negotiations and could have requested discovery concerning those negotiations, he made no attempt to do so. Similarly, although Petitioner makes an oblique argument that he was denied some procedural safeguard, he failed to even attempt to call any witness to testify at the fairness hearing. Petitioner served no subpoena on any Tower officer, any underwriter representative or any counsel involved with the Eastern District Action. Petitioner failed even to call his own supposed damages expert, or the "airline expert" he claimed to have retained but who supposedly was unable to sign an affidavit because of a rib injury. (A13).

In sum, Petitioner was represented by counsel, received full notice, possessed and exploited the opportunity to be heard, and was given several opportunities to opt out of the Class, and thereby the settlement, to pursue whatever individual claims he believed he was entitled to pursue. Due process requires nothing more than this. *See, e.g., Phillips Petroleum, Inc. v. Shutts*, 472 U.S. 797, 811 (1985).

C. Petitioner's Arguments About the Discovery Supporting the Settlement Are Meritless.

Petitioner's arguments for certiorari appear also to include a claim that review is warranted because Class counsel supposedly failed to conduct sufficiently adversarial depositions into the facts underlying Petitioner's myriad non-Hadj claims. However, Petitioner neglects to bring to this Court's attention the District Court's specific finding in this regard, made as part of its "meticulous" application of the relevant factors:

> There is the argument made before me that plaintiff's counsel has done so little investigation into the Branch claims that he's compromising them prematurely.
>
> Having reviewed all of the papers, again, and particularly focusing on the exhibits attached to all of the papers, I am satisfied that plaintiff's counsel, experienced in this area and with apparent sensitivity to the claims of his client, is not prematurely compromising these claims. (A30).
>
> * * *
>
> I am satisfied that adequate inquiry has been made by plaintiff's counsel before me to allow the case to be settled. (A31).

According to Petitioner, on a few instances during the course of depositions, plaintiff's counsel allegedly failed to ask purportedly "logical follow up question[s]" (Petition at 19, 23-27) regarding Petitioner's non-Hadj claims. In particular, plaintiff's counsel allegedly failed to:

- ask William Cain, Josephina Essex, or Morris Nachtomi about Tower's purported decision to retire six aircraft prior to the expiration of their useful life (Petition at 19, 23);
  - This factual assertion, rejected by the District Court and the Court of Appeals, overlooks the clear testimony that no such decision ever was made (J279);
- ask William Cain, Josephine Essex, or Morris Nachtomi about the purported discrepancy between the FAA's estimated cost of complying with the Aging Aircraft Directives and the estimate disclosed in the Prospectus (Petition at 24);

- This argument, rejected by the District Court and the Court of Appeals, fails to recognize that the FAA itself stated that individual carriers' costs would vary widely from the FAA's industry-wide average, and that William Cain testified specifically as to the basis for the estimate disclosed in the Prospectus (J267-68);

- ask Nachtomi why Tower was making planned overflights of the former Yugoslavia enroute Israel and incurring "overflight payments" to the former Yugoslavian government (Petition at 24);

  - This argument simply fails to explain how these overflights – if indeed they ever occurred – could amount to a securities law violation and relies wholly on extra-record assertions (such as: whether and how frequently these overflights allegedly occurred; whether they were planned or not; and whether "overflight payments" [whatever those are] would be due the former Yugoslavian government);

- ask Nachtomi "what bearing did the shortened runways at Ben Gurion Airport have on Tower advertising its New York to Israel flights as being non-stop" (Petition at 25);

  - This argument, rejected by the District Court and the Court of Appeals, ignores the wealth of testimony in the record for any stops made by Tower on flights advertised as non-stop and fails to justify how an allegedly false advertising in the Official Airline Guide amounts to a securities law violation (J157-64);

- ask Nachtomi how the "Tower Air Fleet Reliability Report, Engine Shutdown Rate" affects his testimony that engine

shutdown problems had been resolved by the time of the IPO (Petition at 25);

- ▸ This argument, rejected by the District Court and the Court of Appeals, overlooks the clear testimony and documents demonstrating that the in-flight engine shutdown problem was resolved by the time of the IPO. (J116). The lingering effect on the published rate exists because the rate was backward-looking for the prior twelve months. Thus, even after a problem is cured its effect on this published rate continues (*Compare* J306-09 (charts showing rates upon which Petitioner relies) *with* J301-05 (demonstrating that these IFSD rates are for the prior twelve month period));

- ask Nachtomi whether the inflight engine shutdowns experienced by Tower during the Hadj flights were due to desert conditions or maintenance inadequacies (Petition at 26-27).

  - ▸ This argument, rejected by the District Court and the Court of Appeals, ignores the testimony (including Nachtomi's) that in-flight engine shutdowns during Hadj-flights were the result of desert conditions (J99-100, 113-15, 251-53).

Thus, Petitioner's Monday-morning quarterbacking of plaintiff's counsel's examination of witnesses, at most demonstrates a keen grasp of factual minutiae, but it surely does not provide a basis for granting certiorari.

* * *

In short, Petitioner has failed to present a single argument justifying the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

March 13, 1997

Respectfully submitted,

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